REPUBLIC OF KENYA

THE JUDICIARY

THE SUPREME COURT

OFFICE OF THE CHIEF JUSTICE / PRESIDENT, SUPREME COURT OF KENYA

IN THE MATTER OF ARTICLE 27 (3) & (8) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ARTICLE 81 (b) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ARTICLE 261 (7) OF THE CONSTITUTION OF KENYA 2010

And

IN THE MATTER OF THE PETITIONS FOR DISSOLUTION OF PARLIAMENT

IN THE MATTER OF CJ PETITION NOS. 1-5 OF 2019 & 1 OF 2020 (CONSOLIDATED)

MARGARET TOILI
FREDRICK GICHANGA MBUGUA'H
HON. STEPHEN OWOKO & JOHN WANGAI
AOKO BERNARD
HON. DAVID SUDI
LAW SOCIETY OF KENYA.. PETITIONERS

VERSUS

SPEAKER OF THE NATIONAL ASSEMBLY...........1ST RESPONDENT
SPEAKER OF THE SENATE...................................2ND RESPONDENT
ATTORNEY GENERAL..3RD RESPONDENT

Chief Justice Chambers | Supreme Court Building | **Telephone:** +254 2221221
Email : chiefjustice@court.go.ke | david.maraga@court.go.ke
P.O. Box 30041- 00100 | Nairobi, Kenya
www.judiciary.go.ke

CHIEF JUSTICE'S ADVICE TO THE PRESIDENT PURSUANT TO ARTICLE 261(7) OF THE CONSTITUTION

A. Introduction

[1] Your Excellency, I have before me six petitions seeking that I advise you to dissolve Parliament under Article 261(7) as read with Articles 27(3) & (8), 81(b) and 100 of the Constitution. They are: Petition No. 1 of 2019 by Margaret Toili dated 12th April 2019; Petition No. 2 of 2019 by Fredrick Gichanga Mbugua'h dated 7th May, 2019; Petition No. 3 of 2019 by Stephen Owoko and John Wangai dated 20th November 2018; Petition No. 4 of 2019 by Aoko Bernard dated 18th June 2019; Petition No. 5 of 2019 by Hon. David Sudi dated 10th July 2019; and Petition No. 1 of 2020 by the Law Society of Kenya dated 20th July 2020. As they all raise the same issue and seek the same prayer, I have consolidated them. Copies of those petitions are annexed hereto and marked **"AP1(a) to AP1(e)."**

[2] The Petitions are based on the ground that, despite four Court orders compelling Parliament to enact the legislation required to implement the two-thirds gender rule in accordance with Article 27(3) read together with Articles 81(b) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.

[3] Your Excellency, "**the two-thirds gender rule**" is an acronym for the constitutional imperative which prohibits any form of discrimination in the appointive and elective positions in our country on the basis of one's gender. It is grounded on the declaration in Article 27(3) of the Constitution that "*Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*"

B. Background

[4] Cognizant of the discrimination sections of our society had suffered for centuries, the Kenyan people enacted Article 27 of the Constitution which prohibits any form of discrimination on grounds, amongst others, of race, sex, ethnic or social origin, age, disability or religion. To remedy the situation and "*give full effect to the realisation of the rights guaranteed*"[1] under the Constitution, Article 27 directs the State to "*take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*"[2]

[5] With regard to elective positions, which is the issue in these six petitions, the two-thirds gender rule is set out in Articles 27(8) and 81(b) of the Constitution. Article 27(8) states that in addition to the measures such as affirmative action programmes and policies enumerated in Article 27(6), "*the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.*" Article 81(b) adds that "*The electoral system shall comply with,*" among others, the principle that "*not more than two-thirds of the members of elective public bodies shall be of the same gender.*" Needless to say that Parliament is a public body to which members are elected and Article 100 directs it to "*enact legislation to promote the representation in Parliament of*" amongst others, "*women.*"

[6] To actualize, amongst other obligations, the two-thirds gender principle, Article 261(1) read together with the Fifth Schedule to the Constitution required "*Parliament [to] enact any legislation required by this Constitution to be enacted to govern a particular matter within ... five years*" of the promulgation of the Constitution on **27th August 2010.**

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[1] Article 27(6) of the Constitution
[2] Ibid

[7] Your Excellency, apprehensive that, given the time left, the 10th Parliament was not going to enact the legislation required to give effect to the two-thirds gender rule the Attorney General sought, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR***, the Supreme Court's advisory opinion on the matter. By a majority of four, with the then Chief Justice Mutunga dissenting, the Supreme Court held that the Constitution envisioned a progressive realization of the two-thirds gender rule and directed Parliament to enact the requisite legislation by **27th August 2015**. A copy of the said Supreme Court Advisory opinion is annexed hereto and marked **"AP2"**

[8] Upon failure to enact that legislation, even after extending the period by one year as authorized by Article 261(2) & (3), a petition was filed in the High Court—***Constitutional Petition No. 182 of 2015—Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR***—in which the High Court issued an order of mandamus directing the Attorney General and the Commission on Implementation of the Constitution to "*prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012*" within **forty (40) days** from 26th June 2015. A copy of that decision is annexed hereto and marked **"AP3"**

[9] Despite Bills presented to it pursuant to that order, Parliament did not enact the required legislation prompting the filing in the High Court of another petition—***Constitutional Petition No. 371 of 2016, Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR***. After hearing that petition, the High Court issued another order of mandamus "*directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within a period of* ***sixty (60) days*** *from the date of ... [that] order and to report the progress to the Chief Justice.*" Parliament's appeal against that decision was dismissed by the Court of Appeal in its

judgment in ***Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others [2019] eKLR*** dated 5th April, 2019. Copies of those decisions are annexed hereto and respectively marked **"AP4 & AP5."**

[10] Your Excellency, Parliament, once again, failed to enact the requisite legislation thus provoking the six petitions now before me requiring me to advise you to dissolve it.

[11] After receiving the first two petitions lodged by Margaret Toili and Fredrick Gichanga Mbugua'h, on 26th June 2019 I wrote to the Speakers of both the two Houses of Parliament as well as the Attorney General and requested for a report, pursuant to Article 261(6)(b) of the Constitution, on their compliance with the Court's orders. Both Speakers wrote back and recounted the efforts Parliament had unsuccessfully made to comply with its obligation under Article 261 and the said Court orders. They said they had at that time two other Bills—***the Representation of Special Interest Groups Laws (Amendment) Bill, 2019*** and ***the Constitution of Kenya (Amendment) Bill, 2019***—pending before Parliament and requested for time to enact them. They did not revert to me on the matter. Annexed hereto and marked **"AP6, AP7 & AP8"** are copies of my said letter and the Speakers' responses thereto.

C. The Petitions

[12] Your Excellency, the gravamen of the six petitions is that Parliament having, for over 9 years and despite 4 court orders, failed, refused and/or neglected to enact the requisite legislation, I should, pursuant to the provisions of Article 261(7) of the Constitution, advise you to dissolve Parliament. As Parliament had not advised me whether or not it had passed ***the Representation of Special Interest Groups Laws (Amendment) Bill, 201*** and/or ***the Constitution of Kenya (Amendment) Bill, 2019***, I decided not to engage on further correspondence. Instead, I caused summons to be served upon Parliament and the Attorney General on 3rd August, 2020.

D. The Responses

[13] Your Excellency, in their responses, the two Speakers of Parliament raised preliminary objections and filed replying affidavits. Although granted an opportunity, they did not file any written submissions.

[14] In the preliminary objections, the Speakers contend that the six petitions are incompetent and bad in law for the reason that no court order was "transmitted" to either the Chief Justice or to Parliament as required by Article 261(6)(b) of the Constitution; that the petitions seek interpretation of various provisions of the Constitution which the Chief Justice has no jurisdiction to undertake, as that is the preserve of the High Court under Article 165(3)(b) of the Constitution; that the petitions raise issues which are *sub judice* in ***High Court Constitutional Petition Nos. 397 of 2017*** *and* ***401 of 2017***; and that the order in **Constitutional Petition No. 371 of 2016** was directed to the 11th and not the current 12th Parliament and as such, the Chief Justice has no jurisdiction to entertain any of these Petitions.

[15] In their replying affidavits, it is averred that as Articles 97 and 98 have set a ceiling on the composition of the two houses of Parliament, it is impossible to enact legislation to give effect to the two-thirds gender rule without violating the citizens' political rights under Article 38(3) to vote for candidates of their own choice and/or to vie for any elective position in any public body or office; that there is no budget to stage a bye-election that will ensure the dissolution of Parliament; that given the crisis imposed upon the country by the coronavirus pandemic, it will be against public interest if the Chief Justice advises the President to dissolve Parliament; and that the Chief Justice's advice to the President to dissolve Parliament will trigger a constitutional crisis as Parliament's legislative, oversight, vetting of State Officers and other roles like passing of budget roles will stall.

[16] The Attorney General did not file any response to these petitions.

E. The Scope of the Chief Justice's Jurisdiction under Article 261(7)

[17] Your Excellency, Article 261 is in Chapter 18 of the Constitution which has transitional and consequential provisions. Clauses (1), (2), (3) and (4) of Article 261, read together with the Fifth Schedule to the Constitution, obliges Parliament to enact legislations required to implement provisions of the Constitution within **five (5)** years, with leave to extend that period once for a further one year. If Parliament fails to do that, Clause (5) of that Article vests the High Court with jurisdiction to entertain a petition from any person to *"make a declaratory order"* under Clause 6 *"directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted within the period specified in the order, and to report the progress to the Chief Justice."*

[18] Then Article 261 of the Constitution contains an unusual enforcement mechanism: Clause (7), upon which the 6 petitions before me are anchored, provides as follows:

> ***If Parliament fails to enact legislation in accordance with an order under Clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.***

[19] Contrary to the two Speakers' contention, this Clause clearly vests the Chief Justice with enforcement jurisdiction. That jurisdiction is, however, circumscribed. The Chief Justice is not required or authorized to hold another trial under Article 261(5). As stated, a Petition under Article 261(5) is to be heard and determined by the High Court. The Chief Justice has also no appellate jurisdiction over the High Court decision arising from such Petition. Any party aggrieved by the High Court decision in the matter may appeal to the Court of

Appeal and, if appropriate and authorised, prefer a further appeal to the Supreme Court.

[20] A purposive reading of Article 261 of the Constitution leaves no doubt that the Chief Justice's role under Clause (7) thereof is simply to ascertain if Parliament has satisfied its obligation of result – to enact legislation in accordance with the order given by the High Court. The Chief Justice's role is not to conduct an inquiry into the extent of Parliament's satisfaction of an obligation of conduct towards enacting the required legislation. Rather, the Chief Justice's role is set in bright-line categorical terms:

i. First, to ascertain, as an objective matter, if there is a valid Court order made under Clause (5) of Article 261; and,

ii. Second, if there is such a Court Order, to ascertain whether or not that order has been complied with.

[21] If the Court Order has not been complied with, the Chief Justice is permitted only one course of action: to advise the President to dissolve Parliament. The Constitution donates no discretion to the Chief Justice on the appropriate action to take in the event of non-compliance by Parliament.

[22] In this case, **Your Excellency**, besides the Supreme Court's Advisory Opinion issued on 11th December 2012 in ***Advisory Opinion No. 2 of 2012*** and the High Court order issued on 26th June 2016 in ***Constitutional Petition No. 182 of 2015***, on **29th March 2017**, Justice Mativo made "*a declaratory order*" under Clause (5) of Article 261 in ***Constitutional Petition No. 371 of 2016*** "*directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted within sixty (60) days*" from that date and a report made to the Chief Justice. As stated, the appeal against that decision was dismissed by the Court of Appeal in its judgment dated 5th April 2019 delivered in ***Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others [2019] eKLR***.

F. Analysis and Disposition

[23] In discharging my obligations under Article 261(7) of the Constitution, **Your Excellency**, I am alive to the provisions of Articles 27, 38, 81, 97, 98 and 100 referred to by the two Speakers of Parliament. The constitutional position, however, is that any issues arising from any or all of those provisions do not fall within the purview of my jurisdiction under Article 261(7). Any issues to be raised on any of those provisions should have been directed (and were, in fact, directed to and were determined) by the Courts in response to the Petitions under Article 261(5). The Speakers' contention that no order was "transmitted" to either Parliament or the Chief Justice has no basis. The order in ***Constitutional Petition No. 371 of 2016*** was made in the presence of Parliament's lawyers and the six petitioners "transmitted" copies thereof to the Chief Justice. The argument that the order in ***Constitutional Petition No. 371 of 2016*** was directed to the 11th Parliament has also no basis. The obligation under Article 261(5) to enact the requisite legislation and order in that Petition were directed to Parliament as an institution and not to the 11th Parliament. The Speakers' other contention that dissolution of Parliament will trigger a constitutional crisis has equally no basis. The makers of the Constitution and Parliament itself, in enacting the Constitution, were aware of Article 261 and the other provisions of the Constitution.

[24] On the material placed before me, it is incontestable that Parliament has not complied with the High Court order in ***Constitutional Petition No. 371 of 2016***. As such, for over 9 years now, Parliament has not enacted the legislation required to implement the two-thirds gender rule which, as the Court of Appeal observed in its said judgement, is clear testimony of Parliament's lackadaisical attitude and conduct in this matter. Consequently, it is my constitutional duty to advise Your Excellency to dissolve Parliament under Article 261(7) of the Constitution.

[25] There is no doubt that the dissolution of Parliament will cause inconvenience and even economic hardship. The fact that Kenya is in the midst

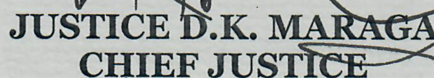
of the coronavirus pandemic only exacerbates the potential impact of the decision. Yet that is the clear result Kenyans desired for Parliament's failure to enact legislation they deemed necessary. We must never forget that more often than not, there is no gain without pain.

[26] Given the wording of Article 261 of the Constitution, Kenyans clearly understood the possible cultural resistance to the transformational ideas on gender equality the Constitution would face. However, the carefully designed enforcement mechanism of dissolution of Parliament under Article 261(7), irrespective of its consequences, is clearly the radical remedy Kenyans desired to incentivize the political elites to adhere to and fully operationalize the transformational agenda of the Constitution they bequeathed to themselves in 2010.

[26] In the circumstances, let us endure pain, if we must, if only to remind ourselves, as a country, that choices, and particularly choices on constitutional obligations, have consequences. Let us endure pain if only to remind the electorate to hold their Parliamentary representatives accountable. Let us endure pain if only to remind ourselves that, as a country, being a democracy that has chosen to be governed by the rule of law, **we must say no to impunity** and hold everyone accountable for their actions or omissions.

[27] In the result, **Your Excellency**, it is my constitutional duty to advise you, the President of the Republic of Kenya, which I hereby do, to dissolve Parliament in accordance with Article 261(7).

DATED this 21st day of September 2020



JUSTICE D.K. MARAGA
CHIEF JUSTICE